Supreme Court, U.S.
FILED

941822 MAY 3 1995

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

October Term, 1994

W.R. GRACE & CO.--CONN., ET AL.,
Petitioners,

vs.

STATE OF WEST VIRGINIA, ET AL.,
Respondents.

Petition For A Writ Of Certiorari
To The West Virginia Supreme Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

ROBERT D. BROWNSON
MICHAEL S. KREIDLER*
STICH, ANGELL, KREIDOR
& MUTH, P.A.
The Crossings, Suite 120
250 Second Avenue South
Minneapolis, MN 55401
(612) 333-6251
**Counsel of Record for Petitioner Asbestospray Corporation*

CHARLES R. BRUTON*
RICHARD W. FOLTZ, JR.
PEPPER HAMILTON & SCHEETZ
3000 Two Logan Square
18th & Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4000
**Counsel of Record for Petitioner Pfizer Inc.*

JAMES J. RESTIVO, JR.
LAWRENCE E. FLATLEY*
DOUGLAS E. CAMERON
REED SMITH SHAW & McCLAY
435 Sixth Avenue
Pittsburgh, PA 15219-1886
(412) 288-3131

FRANK E. SIMMERMAN, JR.
JOHNSON, SIMMERMAN
& BROUGHTON, L.C.

Suite 210, Goff Building
P.O. Box 150
Clarksburg, WV 26302-0150
(304) 623-4900
**Counsel of Record for Petitioner W.R. Grace & Co.--Conn.*

QUESTION PRESENTED FOR REVIEW

Where, in conflict with the constitutional principle that a fair trial before an impartial decisionmaker is fundamental to due process, the West Virginia Supreme Court of Appeals affirmed the actions of a trial judge who admittedly prejudged the merits and acted on that prejudgment in vacating a verdict that had been entered in favor of Petitioners, should this Honorable Court reverse and reinstate the jury's verdict to remedy a serious violation of Petitioners' Fourteenth Amendment right to due process of law?

PARTIES TO THE PROCEEDING

In addition to Petitioners W.R. Grace & Co.--Conn., Pfizer Inc. and Asbestospray Corporation, who were appellants below, the State of West Virginia, City of Spencer and Monroe County Commission were appellees below.

DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

W.R. Grace & Company is the parent corporation of W.R. Grace & Co.--Conn. Its non-wholly owned subsidiaries are: W.R. Grace & Co. (formerly Forrer Industries) and W.R. Grace & Co.--Conn. Cryovac.

Pfizer Inc. has no parent company. Its non-wholly owned subsidiaries are: Laboratoires Pfizer S.A.; Livestock Feeds PLC; Pfizer Bioquimicos, S.A.; Pfizer Egypt S.A.E.; Pfizer Korea Limited; Pfizer Laboratories (Bangladesh) Ltd.; Pfizer Laboratories Ltd. (Thailand); Pfizer Limited (Ghana); Pfizer Limited (India); Pfizer Limited (Sri Lanka); Pfizer Products PLC; and P.T. Pfizer Indonesia; American Medical Systems, Inc.; Schneider (USA) Inc.; Valleylab, Inc.; Pfizer International, Inc.; Health Care Ventures Inc.; Infusaid, Inc.; Pfizer Diagnostic Products; Pfizer Genetics Inc.; Pfizer Medical Systems, Inc.; Pfizer Pigments Inc.; Radiological Sciences, Inc.; Redmond Holding Co.; Site Realty Inc.; Pfizer Pharmaceutical Ltd.; Pfizer European Service Center N.V.; and Shiley Ltd.

Asbestospray Corporation is a now-defunct manufacturer of asbestos products that ceased operations in 1973, and accordingly has neither a parent company nor subsidiaries.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

DISCLOSURE STATEMENT PURSUANT TO RULE 29.1 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS OF THE COURTS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR ALLOWANCE OF THE WRIT

The West Virginia Supreme Court of Appeals' Affirmance of the Improper Actions of a Trial Judge Who Admittedly Prejudged the Merits Deprived Petitioners of Their Constitutional Rights to Due Process of Law 7

The Judgment for Which Petitioners Seek Review is Final and Worthy of This Honorable Court's Review 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) 6-9, 11, 14

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 15-16

Illinois v. Rodriguez, 497 U.S. 177 (1990) 17

McNeely v. Frich, 187 W. Va. 26, 415 S.E.2d 267 (1992) 6

Mills v. Alabama, 384 U.S. 214 (1966) 17

In re Murchison, 349 U.S. 133 (1955) 7-9, 11, 14

Tumey v. Ohio, 273 U.S. 510 (1927) 7

Ward v. Village of Monroeville, 409 U.S. 57 (1972) 7

OTHER AUTHORITIES

U.S. CONST. amend. XIV 2, 5-9, 11-14, 16-18

28 U.S.C. § 1257 ..... 1, 15

W. Va. R. Civ. P. 50 4

Rule XVII, W. Va. Trial Court Rules for Trial Courts of Record 4, 11

OPINIONS OF THE COURTS BELOW

The Order of the West Virginia Supreme Court of Appeals, dated December 21, 1994, affirming in part and reversing in part the trial court's order, is reported at 454 S.E.2d 413 (W.Va. 1994) and appears as Appendix A ("App. A," pp. 1a-30a). The Order of the Circuit Court of Monongalia County, West Virginia, dated September 14, 1993, vacating the jury's defense verdict and granting a new trial, is unreported and appears as Appendix B ("App. B," pp. 31a-34a). The Order of the West Virginia Supreme Court of Appeals, dated March 13, 1995, denying Petitioner W. R. Grace & Co.--Conn.'s Motion for Disqualification of the Honorable Larry V. Starcher, is unreported and appears as Appendix C ("App. C," p. 35a). The Order of the West Virginia Supreme Court of Appeals, dated February 2, 1995, denying Petitioners' Petitions for Rehearing, is unreported and appears as Appendix D ("App. D," p. 36a).

JURISDICTIONAL STATEMENT

The Order of the West Virginia Supreme Court of Appeals sought to be reviewed is dated December 21, 1994. The Order of the West Virginia Supreme Court of Appeals denying Petitioners' Petitions for Rehearing is dated February 2, 1995.

This Honorable Court has jurisdiction by Writ of Certiorari pursuant to 28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

Petitioners W.R. Grace & Co.--Conn. ("Grace"), Pfizer Inc. ("Pfizer") and Asbestospray Corporation ("Asbestospray") have been subjected to flagrant judicial partiality and stripped of a jury verdict in their favor by a West Virginia trial judge who ***admittedly*** prejudged the merits and who boasted that he would "direct the direction" of the case. The West Virginia Supreme Court of Appeals which, after criticizing the trial judge for his actions, established a new standard of review that gave that trial judge much broader discretion for vacating a jury verdict than previously allowed, applied it retroactively and affirmed. Petitioners ask this Court to grant certiorari to remedy these deprivations of their constitutional right to due process of law.

Petitioners are defendants in an action in the Circuit Court of Monongalia County, West Virginia, in which the State of West Virginia and two of its municipalities (hereinafter the "State") brought products liability claims against Petitioners, former manufacturers of asbestos-containing construction materials.

The West Virginia state trial judge presiding over the State's claims admittedly prejudged the merits of Petitioners' defenses, based on his personal beliefs and experiences. Before

any defense witnesses testified, the trial judge announced his prejudgment of the merits, including the critical factual issue of product defect, and his belief that the conduct of Petitioners was "prospectively and retrospectively . . . egregious."

Specifically, just after the State rested its case-in-chief, the trial judge said that based on his own "experience" in asbestos bodily injury cases, he concluded that "[all asbestos-containing] products are defective as a matter of fact and a matter of law," (R. 4210, Vol. 8)[1] and that he would steer the case toward a plaintiff's verdict (R. 4209, Vol. 8) (emphasis added):

> ***In the first asbestos personal-injury case that I tried, I left that [defect] issue open, and it was a defense verdict. And I suppose one might say that, therefore, the Court is directing the direction that these cases go, and I might say, Well maybe I am,*** but I am not standing alone when I do that. I'm not going out on some limb that no other judge in this county has done, and I am well aware of that.

In the context of a discussion of his personal experiences with asbestos-containing products, the trial judge also said (R. 4212, 4214, Vol. 8):

> It is absolutely asinine for the defendants to stand before any body of reasonably thinking persons and tell them that these products can be made safe forever despite the fact that, if [asbestos fibers] are breathed, [the defendants] acknowledge that they might cause health problems.
>
> * * *
>
> To argue that the products properly encapsulated or maintained, et cetera, are perfectly safe, to me, won't fly, just as a matter of fact.

---

[1]References herein to the proceedings in the West Virginia court are to the page and volume of the 24-volume Joint Appeal Record filed with the West Virginia Supreme Court of Appeals.

The trial judge then further demonstrated his predisposition and prejudice, stating that his "inclination would be to want to bar the defendants from coming forward with any testimony whatsoever that would show [the products are not defective]." (R. 4215, Vol. 8).

When reminded that Rule 50 of the West Virginia Rules of Civil Procedure prohibited directing a verdict until the close of the evidence, the trial judge stated that he would postpone entering an order consistent with his belief that all asbestos-containing materials were defective because of a "fear that it will get me in trouble on appeal," although he reiterated his conviction that "I am right." (R. 4215, Vol. 8).

At this point during the trial, when the trial judge first formally announced that he had prejudged the merits, Grace and Pfizer filed a disqualification motion under Rule XVII of the West Virginia Trial Court Rules for Trial Court's of Record, asking the trial judge to recuse himself. He refused. The West Virginia Supreme Court of Appeals declined to review his decision at that time and the trial proceeded.

Two months later, at the conclusion of the six-month trial, over Petitioners' objections, the trial judge acted on his previous statements, personal opinions and prejudgment by taking the disputed factual issue of product defect from the jury. The trial judge instructed the jury that Petitioners' products were defective as a matter of law and left for the jury's consideration only the issues of product identification, causation and damages. After more than two days of deliberations, the jury rejected the State's claims and returned a verdict in favor of Petitioners.

At the hearing on the State's motion for a new trial, the trial judge again admitted he had prejudged the merits (R. 161-62, Vol. 1):

> [M]y belief and my continued belief, my belief at the start of the trial and my belief today [is] that asbestos-containing products are per se defective . . .

Later, true to his previously expressed intentions, the trial judge acted on his prejudgment of the merits, vacated the jury's defense verdict and ordered a new trial.

On appeal to the West Virginia Supreme Court of Appeals, Petitioners argued, *inter alia*, that their rights under the United States Constitution had been violated; for example:

> By prejudging the issue of defect and then refusing to disqualify itself, the [trial] court violated [Petitioners'] constitutional rights to trial by jury, due process and equal protection . . . To announce, before hearing any defense evidence, that the court had decided various contested issues of fact and would preclude those issues from being decided by the jury violates both the letter and the spirit of established constitutional law. By prejudging one of the most disputed facts in this case, the court acted with partiality and in violation of [Petitioners'] constitutional rights.

Joint Brief of Appellants, filed March 11, 1994, p. 42.

The West Virginia Supreme Court of Appeals declined to remedy the injustice. On December 21, 1994, it affirmed the trial court's order insofar as it vacated the jury verdict and granted a new trial, adopting a new standard of review that conferred upon trial judges much broader discretion in vacating jury verdicts than allowed by the "sufficient evidence" standard under which

the case had been tried, appealed and twice argued,[2] and applying the new standard retroactively. App. A.

Ironically, the West Virginia Supreme Court of Appeals criticized the trial judge for basing findings "upon facts which are merely matters of his personal knowledge as distinguished from proof of such facts." App. A at 18a. It also criticized the trial judge for making statements "which may have been intemperate" and cautioned "the trial judge to exercise more restraint in making comments with regard to the merits or lack of merits of a party's position without proper support." App. A at 21a. Nevertheless, the West Virginia Supreme Court not only refused to act in response to the judge's admitted prejudgment—it expanded his authority to vacate a jury verdict.

Petitioners filed Petitions for Rehearing in the West Virginia Supreme Court of Appeals on January 19 and 20, 1995. In their Petitions, Petitioners again raised the constitutional issues - namely, that their constitutional right to due process had been violated by the actions of the trial court and that those violations had been compounded by the West Virginia Supreme Court.[3] Petitioners' Petitions for Rehearing were denied on February 2, 1995. App. D at 36a.

The West Virginia Supreme Court of Appeals passed upon the constitutional issues by ignoring them completely. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 819 (1986) (state court did in fact reach the merits of a constitutional challenge where a

---

[2]Under prior West Virginia law, a jury verdict was to stand unless, while viewing every reasonable and legitimate inference fairly arising from the evidence in favor of the prevailing party, the verdict was not supported by sufficient evidence. *McNeely v. Frich*, 187 W. Va. 26, 29, 415 S.E.2d 267, 270 (1992).

[3] More specifically, Grace, Pfizer and Asbestospray each filed a Petition for Rehearing; Pfizer and Asbestospray explicitly adopted from Grace's petition the discussions of law and arguments with respect to the constitutional claims.

Fourteenth Amendment due process issue was raised after a decision on the merits and where the state court's order in response thereto made no reference whatsoever to the Constitution).

Later, when Grace again sought relief by filing a second motion to disqualify the trial judge, the West Virginia Supreme Court of Appeals, after having criticized the trial judge in its prior opinion, concluded that the trial judge's admitted prejudgment of factual issues based on his personal beliefs and experiences and his desire to prevent the defendants from coming forward with any evidence, were "facially insufficient" to even raise an issue of partiality. App. C at 35a.

Petitioners have exhausted every available state court remedy and have found no relief. Deprived of their right to due process under the United States Constitution, Petitioners hereby seek certiorari to remedy the constitutional violations they have already suffered and to halt the West Virginia judicial system's unconstitutional treatment of them.

REASONS FOR ALLOWANCE OF THE WRIT

The West Virginia Supreme Court of Appeals' Affirmance of the Improper Actions of a Trial Judge Who Admittedly Prejudged the Merits Deprived Petitioners of Their Constitutional Rights to Due Process of Law.

An impartial judge is fundamental to a fair trial; in the absence of this quintessence of justice, a litigant's constitutional right to due process of law is violated. U.S. CONST. amend. XIV; *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-25 (1986); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972); *In re Murchison*, 349 U.S. 133, 136 (1955); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

In *Murchison*, a state court judge who had acted as a "one-man grand jury" also presided over contempt proceedings arising out of events which took place during the grand jury proceedings. The trial judge found the petitioners guilty of contempt and the Supreme Court of Michigan affirmed. Without a finding or contention of bias, this Court concluded it was a violation of the due process requirement of an impartial tribunal for the judge who had served as the "one-man grand jury" to preside over the contempt proceedings. This Court held that it was error for the Supreme Court of Michigan to uphold the convictions and reversed.

As Justice Black explained:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."

349 U.S. at 136 (citations omitted); *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. at 831 ("assurance of impartiality . . . is the fundamental requirement of due process") (Brennan, J., concurring).

In *Lavoie*, this Court addressed the issue of whether an Alabama Supreme Court Justice's participation in a case in which he allegedly had an interest violated the appellant's due process rights. *Lavoie* involved a claim against appellant insurer for its

refusal to pay a hospital bill, seeking payment of the bill and punitive damages. The jury awarded $3.5 million in punitive damages and the Alabama Supreme Court affirmed. While the case was on appeal, one of the Alabama Supreme Court Justices filed two lawsuits against insurance companies alleging bad faith failure to pay insurance claims and seeking punitive damages.

The *Lavoie* Court concluded that the Justice arguably had a direct stake in the outcome of that case and thus his participation in the case violated appellant's due process rights. Significantly, the Court was not required to decide whether the Justice was actually influenced; rather, it was the appearance or probability of unfairness which resulted in the conclusion that the Justice's participation deprived appellant of due process.

Appellant in *Lavoie* also alleged that the Justice's general frustration with insurance companies constituted a disqualifying bias. The Court noted that it need not determine whether allegations of bias or prejudice by a judge would ever rise to the level of a constitutional violation, concluding only that appellant's general allegations of the Justice's bias and prejudice against insurance companies who delayed paying claims were insufficient to establish a constitutional violation. The Court recognized, however, that in some cases, alleged judicial bias or prejudice could deprive a litigant of its constitutional right to due process.

Unlike the mere appearance of unfairness in *Murchison* and *Lavoie* and the general allegations of bias or prejudice in *Lavoie*, in the instant action the trial judge admittedly prejudged the merits and acted on his prejudgment by taking the issue of product defect from the jury and again later vacating the jury's defense verdict.

Prior to hearing any defense witnesses, the trial judge announced he had prejudged the merits of Petitioners' defenses,

including the critical factual issue of product defect, and announced his belief that Petitioners' conduct was "egregious." The trial judge stated he would steer the case toward a plaintiff's verdict (R. 4209, Vol. 8) (emphasis added):

> ***In the first asbestos personal-injury case that I tried, I left that [defect] issue open, and it was a defense verdict. And I suppose one might say that, therefore, the Court is directing the direction that these cases go, and I might say, Well maybe I am,*** but I'm not standing alone when I do that. I'm not going out on some limb that no other judge in this country has done, and I am well aware of that.

The trial judge's statement not only reveals his predisposed mindset and prejudice toward Petitioners, but the "facts" upon which the judge based his conclusion are demonstrably incorrect. Petitioners are not aware of any other court in the country that has taken the disputed factual issue of product defect from the jury in an asbestos property damage case.[4] In fact, the only other West Virginia asbestos property damage lawsuit and more than twenty other asbestos property damage cases outside the State of West Virginia have resulted in defense verdicts, including numerous verdicts that were or may have been based on a jury finding that the products at issue were not defective.

Nevertheless, without having heard any defense witnesses and in the context of a discussion of his personal experiences with asbestos-containing products, the trial judge announced that it would be "absolutely asinine for the defendants" to argue the merits of their defense (R. 4212, Vol. 8) and that he wanted "to

---

[4]This case is an asbestos property damage case, not an asbestos bodily injury case. The issue in asbestos property damage cases concerns the alleged hazards of in-place asbestos-containing construction materials, not the potential health effect of long-term exposure to industrial levels of asbestos in the workplace.

bar the defendants from coming forward with any testimony whatsoever that would show otherwise." (R. 4215, Vol. 8).

The trial judge's statements, opinions and conclusions, admittedly based on his own "experience" and personal beliefs, were announced before Petitioners had presented their case; they clearly showed the trial judge's prejudgment of the merits, prejudice toward Petitioners and an inability to keep an open and impartial mind on disputed issues.

At the close of the case, the trial judge acted on his prejudgment and prejudice by refusing to charge the jury on the issue of product defect. Later, following the jury's defense verdict, and after again admitting during argument on the State's motion for a new trial that he had made up his mind on the product defect issue at the outset of the case (R. 161-62, Vol. 1), the trial judge vacated the jury's verdict.

The denials of due process to which Petitioners have been subjected have been numerous and extreme. By prejudging critical disputed issues of fact, acting on this prejudgment, admitting that nothing had changed the personal beliefs he held at the start of the trial and, especially, by vacating the jury verdict, the trial judge acted with clear partiality and prejudice and in direct violation of Petitioners' constitutional right to due process. Petitioners were denied a fair trial and a fair hearing before an impartial judge. *See Lavoie*, 475 U.S. at 825, 829-30; *Murchison*, 349 U.S. at 136-39.

In its December 21 Order, the West Virginia Supreme Court of Appeals declined to hear Petitioners' claims of judicial prejudgment and prejudice, on the grounds that the "issue is more appropriately disposed of pursuant to Rule XVII." App. A at 21a. This failure to address the trial judge's flagrant prejudgment of the merits was a denial of Petitioners' constitutional right to due process of law.

The Supreme Court of Appeals also compounded Petitioners' constitutional injuries by rejecting its long-standing "sufficient evidence" standard for renewing new trial orders and adopting a new standard giving trial judges much broader discretion in ordering new trials and then applying that new standard retroactively.

The standard adopted in the appellate court's December 21 Order was a substantial change from prior West Virginia law, with the result that West Virginia trial judges are now allowed very broad discretion to set aside jury verdicts. App. A at 26a & n.4 (the Court of Appeals draws near to the theory that a trial judge hearing a motion for a new trial is a "thirteenth juror," whereby he or she "weighs the evidence independently to determine whether there is sufficient evidence to support the verdict.") (Cleckley, J., concurring).

The court basically announced that it will presume fairness and objectivity among the State's trial judges, an assumption that in most circumstances is well-warranted. In the case at bar, however, the new standard denied to Petitioners meaningful review of an order vacating a jury verdict by a trial judge who openly admitted his prejudgment and prejudice.

Ironically, although it adopted this new standard in deference to the self-restraint of the state's trial judges, App. A at 27a, the West Virginia Supreme Court of Appeals criticized the trial judge for basing findings on his own personal knowledge and for his intemperate statements made without proper support:

> It appears the trial judge took judicial notice that asbestos-containing products are defective as a matter of law. If this is the case, we assert that: "[w]hile courts are permitted to take judicial notice of certain facts, it is well settled that a trial judge is not permitted to base a finding upon facts which are merely matters of his personal knowledge as distinguished from proof of such facts."

* * *

> [W]e caution the trial judge to exercise more restraint in making comments with regard to the merits or lack of merits of a party's position without proper support. Obviously, impartiality in a judge is of the utmost importance to instill confidence in the judiciary.

App. A at 18a, 21a.

The West Virginia Supreme Court of Appeals therefore has chosen to defer to the "self-restraint" of a trial judge who openly proclaimed that his mind was closed on one of the case's fundamental factual issues ***before the trial began*** and who announced in the middle of trial that he was "directing the direction" of the case toward a plaintiff's verdict.[5] The court's explicit reliance on such "self-restraint" - on a record where the court has recognized that the trial judge should have exercised "more restraint" and criticized the trial judge for basing a finding on his own personal knowledge and for making intemperate statements about the merits without proper support[6] - is an endorsement of the trial judge's admitted prejudgment, an indisputable violation of Petitioners' constitutional right to due process of law.

The violations of Petitioners' due process rights were again compounded when the West Virginia Supreme Court of Appeals denied Grace's Motion for Disqualification of the trial judge after he again refused to recuse himself - a motion Grace filed pursuant to the appellate court's suggestion - concluding without any explanation whatsoever that the trial judge's statements and

---

[5]See quote, *supra* at 3, 10.

[6]App. A at 21a.

actions were "facially insufficient to warrant such disqualification." App. C at 35a.[7]

As noted above, *Murchison* and *Lavoie* recognize that the due process clause requires that a litigant be provided a fair trial before an impartial decisionmaker. In failing to give meaningful review to an issue so fundamental to the judicial system as a trial judge's admitted prejudice and prejudgment of the merits, and then remanding the case to the same trial judge, the West Virginia Supreme Court of Appeals has egregiously deprived Petitioners of their constitutional right to due process of law. *See Murchison,* 349 U.S. at 136-39; *Lavoie*, 475 U.S. at 820-25, 829-30.

While this Court has not previously been called upon to decide whether a trial judge's admitted prejudgment of the merits followed by the trial judge's acting on said prejudgment to vacate a jury defense verdict is a violation of a litigant's due process rights, the West Virginia Supreme Court of Appeals, by its failure to recognize said actions as constitutional violations, has decided an important question of federal law which has not been, but should be, settled by this Court. *See Lavoie,* 475 U.S. at 830 ("Nothing in the Court's opinion should be read, as I understand it, to limit these precedents in any way. Rather, the Court clearly indicates the contrary in acknowledging that the interests which trigger due process condemnation 'cannot be defined with precision.' " (quoting *Murchison, supra,* 349 U.S. at 136)) (Brennan, J., concurring).

---

[7]In addition, because there is no intermediate appellate court and no automatic right of appeal to the West Virginia Supreme Court of Appeals from a trial court's decision, Petitioners may be deprived of any review of the actions of the trial judge who has admittedly prejudged the merits.

The Judgment for Which Petitioners Seek Review is Final and Worthy of This Honorable Court's Review.

As discussed above, this case involves a federal question - the deprivation of Petitioners' right to due process of law. By statute, the Supreme Court of the United States reviews only final judgments or decrees. 28 U.S.C. § 1257 (1995). This Court often accepts certiorari in situations in which a state's highest court has finally determined a federal issue, but in which there are further proceedings to come in the state court. *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 471, 481-83 (1975).

As the *Cox Broadcasting* Court explained:

> There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts.
>
> * * *
>
> In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case.
>
> * * *
>
> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause

> of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Id. at 477, 481-83.

The case at hand falls within the third and fourth categories delineated by this Court in *Cox Broadcasting*. The underlying action in *Cox Broadcasting* concerned a Georgia statute which prohibited the broadcasting of the names of rape victims. After the Georgia Supreme Court held that the statute was constitutional, rejecting the contention that the broadcasts were privileged under the First and Fourteenth Amendments, it remanded for a new trial. In that instance, Georgia's decision on the federal issue was plainly final and not subject to further review in the state courts, despite the fact that a new trial was to be held. This Court concluded that even though the appellants might prevail at the new trial on nonfederal grounds, if the Georgia court had erroneously upheld the statute in the face of the constitutional challenge, there should be no trial at all. 420 U.S. at 485.

As in *Cox Broadcasting*, the federal issues in the instant action have been finally determined by the West Virginia courts. While further proceedings on the merits are anticipated, Petitioners will not have an opportunity to reassert either that they should not have been stripped of their jury verdict or that the trial judge, who will preside again at the new trial, was predisposed to ruling for the State in the initial trial. Such issues simply will not be re-litigated, whatever the ultimate outcome of the case.

In addition, while Petitioners could prevail on the merits at the new trial on nonfederal grounds, this Court's reversal of the

state court on the federal issue and reinstatement of the jury verdict would bring the instant action to a conclusion that would give effect to the jury's 1993 verdict. Moreover, this Court's refusal to immediately review the West Virginia court's decision would seriously erode federal policy, given the state courts' egregious violations of Petitioners' rights under the United States Constitution.

Granting certiorari in this case comports with the principle that denying review at stages such as this would "result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." *Mills v. Alabama*, 384 U.S. 214, 217-18 (1966) (holding that a judgment of the Alabama Supreme Court was final which remanded the case for trial after denying claims that a state statute was unconstitutional).[8]

[8]Furthermore, the decision at issue does not rest upon adequate and independent state grounds. *See, e.g., Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990) (discussing requirement). By definition, the state grounds were not adequate, given that the courts' actions themselves have resulted in depriving Petitioners of their constitutional rights. This is especially true because a new rule of law was issued on appeal that compounds the constitutional violations Petitioners have suffered, the extent of which is only fully realized at the present stage.

CONCLUSION

The West Virginia Supreme Court of Appeals, in affirming the Circuit Court of Monongalia County, West Virginia, has decided questions of federal law in a manner contrary to decisions of this Court. In so doing, Petitioners have been deprived of their due process rights under the United States Constitution. Based on the arguments and authorities set forth above, Petitioners respectfully request that this Honorable Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

ROBERT D. BROWNSON
STICH, ANGELL, KREIDOR
& MUTH, P.A.
The Crossings, Suite 120
250 Second Avenue South
Minneapolis, MN 55401
(612) 333-6251
Counsel of Record
for Petitioner
Asbestospray Corporation

CHARLES R. BRUTON*
RICHARD W. FOLTZ, JR.
PEPPER HAMILTON
& SCHEETZ
3000 Two Logan Square
18th & Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4000
**Counsel of Record*
for Petitioner
Pfizer Inc.

JAMES J. RESTIVO, JR.
LAWRENCE E. FLATLEY*
DOUGLAS E. CAMERON
REED SMITH SHAW
& McCLAY
435 Sixth Avenue
Pittsburgh, PA 15219-1886
(412) 288-3131

FRANK E. SIMMERMAN, JR.
JOHNSON, SIMMERMAN
& BROUGHTON, L.C.
Suite 210, Goff Building
P.O. Box 150
Clarksburg, WV 26302-0150
(304) 623-4900
**Counsel of Record*
for Petitioner
W.R. Grace & Co.--Conn.

Dated: May 3, 1995

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1994 Term

No. 22023

IN RE: STATE OF WEST VIRGINIA
PUBLIC BUILDING ASBESTOS LITIGATION

No. 22024

IN RE: STATE OF WEST VIRGINIA
PUBLIC BUILDING ASBESTOS LITIGATION

No. 22025

IN RE: STATE OF WEST VIRGINIA
PUBLIC BUILDING ASBESTOS LITIGATION

Appeal from the Circuit Court of Monongalia County
Honorable Larry V. Starcher, Judge
Civil Action No. 86-C-458

AFFIRMED, IN PART
REVERSED, IN PART
AND REMANDED.

Submitted: November 2, 1994
Filed: December 21, 1994

ARTHUR M. RECHT
PATRICK S. CASEY
Schrader, Recht, Byrd, Byrum & Companion
Wheeling, West Virginia
FRANK E. SIMMERMAN, JR.
Bowles, Rice, McDavid, Graff & Love
Clarksburg, West Virginia
JAMES J. RESTIVO, JR.
LAWRENCE E. FLATLEY
DOUGLAS E. CAMERON
GEORGE L. STEWART II
Of Counsel
Reed Smith Shaw & McClay
Attorneys for the Appellant, W. R. Grace & Co.

THOMAS R. GOODWIN
SUSAN C. WITTEMEIER
Goodwin & Goodwin
Charleston, West Virginia
CHARLES R. BRUTON
RICHARD W. FOLTZ, JR.
Of Counsel
Pepper, Hamilton & Scheetz
Philadelphia, Pennsylvania
Attorneys for the Appellant, Pfizer, Inc.

DIANA EVERETT
Ruley & Everett
Parkersburg, West Virginia
ROBERT D. BROWNSON
Of Counsel
Stich, Angell, Kreidler & Muth
Minneapolis, Minnesota
Attorneys for the Appellant, Asbestospray

DARRELL V. MCGRAW, JR.
Attorney General
SILAS B. TAYLOR
Senior Deputy Attorney General
Charleston, West Virginia
THOMAS R. SHERAN
R. TERRI MANDEL
MICHAEL J. LUSUM
O'Connor & Kannan
Minneapolis, Minnesota
Attorneys for the Appellees

JAMES A. VARNER
CATHERINE D. MUNSTER
McNeer, Highland & McMunn
Clarksburg, West Virginia
Attorneys for Armstrong World Industries, Inc., Amicus Curiae

JUSTICE McHUGH delivered the Opinion of the Court.

Chief Justice Brotherton did not participate.

Retired Justice Miller did not participate.

Justice Cleckley concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

---

1. " 'It takes a stronger case in an appellate court to reverse a judgment awarding a new trial than one denying it and giving judgment against the party claiming to have been aggrieved.' Point 1, Syllabus, *The Star Piano Co. v. Brockmeyer*, 78 W. Va. 780 [, 90 S.E. 338 (1916)]." Syl. pt. 2, *Young v. Duffield*, 152 W. Va. 283, 162 S.E.2d 285 (1968).

2. "An appellate court is more disposed to affirm the action of a trial court in setting aside a verdict and granting a new trial than when such action results in a final judgment denying a new trial." Syl. pt. 4, *Young v. Duffield*, 152 W. Va. 283, 162 S.E.2d 285 (1968).

3. A motion for a new trial is governed by a different standard than a motion for a directed verdict. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the *West Virginia Rules of Civil Procedure*, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion.

4. "By virtue of the authority of Article VIII, Section 21 of the Constitution of West Virginia and of Code, 1931, 2-1-1 it is within the province of the Legislature to enact statutes which abrogate the common law." Syl., *Perry v. Twentieth Street Bank*, 157 W. Va. 963, 206 S.E.2d 421 (1974).

5. W. Va. Code, 55-2-19 [1923] abrogates the common law doctrine of *nullum tempus occurrit reqi* thereby making statutes of limitations applicable to the State.

6. " 'Where the evidence given on behalf of the defendant is clearly insufficient to support a verdict for him so that such verdict, if returned by a jury, must be set aside, and the evidence of the plaintiff is clear and convincing, it is the duty of the trial court, when so requested, to direct a verdict for the plaintiff.' Point 5 Syllabus, *Sommerville v. The Pennsylvania Railroad Co.*, 151 W. Va. 709 [, 155 S.E.2d 865 (1967)]." Syl. pt. 4, *Jones*,

Inc. v. W. A. Wiedebusch Plumbing and Heating Co., 157 W. Va. 257, 201 S.E.2d 248 (1973).

7. "The defense of assumption of risk is available against a plaintiff in a product liability case where it is shown that the plaintiff had actual knowledge of the defective or dangerous condition, fully appreciated the risks involved, and continued to use the product. However, the plaintiff is not barred from recovery unless his degree of fault under assumption of risk equals or exceeds the combined fault of the other parties to the accident." Syl. pt. 3, *King v. Kayak Manufacturing Corporation*, 182 W. Va. 276, 387 S.E.2d 511 (1989).

8. " ' "Where [in a trial by jury] there is competent evidence tending to support a pertinent theory in the case, it is the duty of the trial court to give an instruction presenting such theory when requested to do so. *McAllister v. Weirton Hospital Co.*, 173 W. Va. 75, 81, 312 S.E.2d 738, 744 (1983) (citations omitted)." Syl. pt. 2, *Brammer v. Taylor*, 175 W. Va. 728, 338 S.E.2d 207 (1985).' Syllabus Point 2, *Ventura v. Winegardner*, 178 W. Va. 764, 357 S.E.2d 764 (1987)." Syl. pt. 6, *King v. Kayak Manufacturing Corporation*, 182 W. Va. 276, 387 S.E.2d 511 (1989).

9. "At common law, the purchaser of all the assets of a corporation was not liable for the debts or liabilities of the corporation purchased. This rule has since been tempered by a number of exceptions and statutory provisions." Syl. pt. 2, *Davis v. Celotex Corporation*, 187 W. Va. 566, 420 S.E.2d 557 (1992).

10. "A successor corporation can be liable for the debts and obligations of a predecessor corporation if there was an express or implied assumption of liability, if the transaction was fraudulent, or if some element of the transaction was not made in good faith. Successor liability will also attach in a consolidation or merger under W. Va. Code, 31-1-37(a)(5) (1974). Finally, such

liability will also result where the successor corporation is a mere continuation or reincarnation of its predecessor." Syl. pt. 3, *Davis v. Celotex Corporation*, 187 W. Va. 566, 420 S.E.2d 557 (1992).

McHugh, Justice:

The appellants, Asbestospray Corporation, Pfizer, Inc., and W. R. Grace & Co., appeal the September 14, 1993 order of the Circuit Court of Monongalia County which vacated the jury's verdict for the appellants and granted a new trial. This case arose as an asbestos property damage case in which the appellees, the State of West Virginia, the City of Spencer and the Monroe County Commission, sought monetary relief for the removal and/or management of asbestos from its public buildings.

I.

The appellants were the manufacturers of the asbestos-containing building materials that may have been installed in twenty-six buildings throughout the State between 1958 and 1973. The appellees filed an action seeking monetary relief for the removal and/or management of the asbestos from its public buildings against the appellants.

After a six-month trial, in which a tremendous amount of evidence was presented to the jury, the trial judge instructed the jury that the asbestos-containing products involved in this case are defective as a matter of law. Therefore, the jury only was to consider whether the appellants' products were present in one or more buildings, and if their products were present, the amount of damages which should be awarded to the appellees, including past and future costs for in-place management and/or removal.

The jury returned a verdict finding that the appellees were entitled to no damages. Thereafter, the trial judge vacated the jury verdict in a September 14, 1993 order stating:

> The Court DIRECTED LIABILITY as a matter of law that asbestos-containing products are inherently dangerous products. This left for the jury the issue of whether the plaintiffs proved that the respective defendants had such products in the buildings at issue, and, if so, the damages resulting from their presence. Therefore, the Court did not direct liability as to any one or more specific defendants. However, during the trial, on the issue of product identification, the existence of a defendant's product was admitted to be in several of the plaintiff's [sic] buildings by more than one of the defendants. Additionally, there was more than substantial evidence that all defendants had products in one or more of the subject buildings. There was also an abundance of evidence on the cost of maintenance, removal, and/or repair relating to the products. Nevertheless, the jury returned a verdict of '0' damages. This verdict is manifestly inadequate given the proof presented in the trial of this matter.

The trial judge went on to state that the jury verdict was a "type 1" inadequate award under *Freshwater v. Booth*, 160 W. Va. 156, 233 S.E.2d 312 (1977);[1] therefore, he vacated the jury's verdict and awarded a new trial only on the issues of product identification and damages.

The appellants have asked us to review the trial judge's September 14, 1993 order. After arguments before this Court on

---

[1]The Court in *Freshwater* described a type I case as follows:

> The easiest type of inadequate jury award is where the plaintiff would have been entitled to a directed verdict on liability as a matter of law, and the damages are inadequate even when viewed most strongly in favor of the defendant. In this type of case an appellate court need not agonize about reversing and remanding for a new trial on the issue of damages alone and that is the proper course. *Freshwater*, supra, at 160, 233 S.E.2d at 315. Additionally, although it does not affect a type I analysis, *Freshwater* was overruled, in part, in *Linville v. Moss*, 189 W. Va. 570, 433 S.E.2d 281 (1993).

May 4, 1994, this Court requested the parties to provide additional information to assist it with its examination of the voluminous record. Thereafter, the parties reargued the case before this Court on November 2, 1994.

II.

The first issue is whether the trial judge improperly vacated the jury's verdict and awarded a new trial. In order to resolve this issue, it is necessary to establish the appropriate standard of review of the trial judge's decision.

A trial judge has the authority to vacate a jury verdict and award a new trial pursuant to Rule 59 of the *West Virginia Rules of Civil Procedure* which states, in relevant part: "A new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law[.]" Rule 59 merely recognizes the common law principle that a judge may vacate a verdict of the jury. 11 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2801 at 27 (1973).[2]

Although the trial judge should rarely grant a new trial, the trial judge, nevertheless, has broad discretion to determine whether or not a new trial should be granted: "Courts do not grant new trials unless it is reasonably clear that prejudicial error

---

[2]Rule 59 of the *Federal Civil Judicial Procedure and Rules* states, in relevant part: "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States[.]"

Although there are language differences between *W. Va. R. Civ. P.* 59 and Rule 59 of the *Federal Civil Judicial Procedure and Rules*, the purpose behind the two rules is substantially the same. Therefore, we will examine explanations regarding the federal counterpart to *W. Va. R. Civ. P.* 59 in order to aid our understanding of Rule 59.

has crept into the record or that substantial justice has not been done . . . Ultimately the motion invokes the sound discretion of the trial court, and appellate review of its ruling is quite limited.'' Wright, *supra* at § 2803 at 32-33 (footnotes omitted). However, it has been pointed out:

> There are few subjects in the entire field of procedure that have been subject to so much change and controversy in recent years as the proper scope of review of an order granting or denying a motion for a new trial. The trial court has very broad discretion and the appellate courts will defer a great deal to his exercise of this discretion. This much is settled.

Wright, *supra* at § 2818 at 118.

On several occasions this Court has addressed the standard of review to be accorded to the decision of the trial judge to set aside a jury verdict and award a new trial. In syllabus points 4 and 5 of *Keaner v. Trenton*, 158 W. Va. 997, 216 S.E.2d 880 (1975), this Court held:

> 4. 'The judgment of a trial court in setting aside a verdict and awarding a new trial is entitled to peculiar weight and its action in this respect will not be disturbed on appeal unless plainly unwarranted.' *Syllabus* point 3., *Young v. Duffield*, 152 W. Va. 283, 162 S.E.2d 285 (1968).
>
> 5. The test is reviewing a judgment setting aside a jury verdict and awarding a new trial is whether the trial court's discretion in supervising verdicts, so as to prevent a miscarriage of justice, has been abused.

Additionally, in syllabus points 2 and 4 of *Young v. Duffield*, 152 W. Va. 283, 162 S.E.2d 285 (1968) this Court further provided:

> 2. 'It takes a stronger case in an appellate court to reverse a judgment awarding a new trial than one denying it and giving judgment against the party claiming to have

been aggrieved.' Point 1, Syllabus, *The Star Piano Co. v. Brockmeyer*, 78 W. Va. 780 [, 90 S.E. 338 (1916)].

4. An appellate court is more disposed to affirm the action of a trial court in setting aside a verdict and granting a new trial than when such action results in a final judgment denying a new trial.

Another syllabus by this Court emphasizes the legal principle that this Court will not review an order setting aside a jury verdict and awarding a new trial unless it was an abuse of discretion for the trial judge to enter such order:

A trial judge is not merely a referee but is vested with discretion in supervising verdicts and preventing miscarriages of justice, with the power and duty to set a jury verdict aside and award a new trial if it is plainly wrong even if it is supported by some evidence, and when a trial judge so acts, his decision, being in discharge of his power and duty to pass upon the weight of the evidence to that limited extent, is entitled to peculiar weight and will not be disturbed on appeal unless clearly unwarranted.

Syl. pt. 1, *Cook v. Harris*, 159 W. Va. 641, 225 S.E.2d 676 (1976).

This Court, however, has previously interjected itself into the analysis of whether a new trial was properly granted by setting forth standards regarding how the evidence should be weighed:

'In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true.' Syllabus point 3, *Walker v. Monongahela Power Company*, 147 W. Va. 825, 131 S.E.2d 736 (1963).

Syl. pt. 3, *McNeely v. Frich*, 187 W. Va. 26, 415 S.E.2d 267 (1992).[3] However, this type of analysis is misleading in light of the purpose of Rule 59.

Under Rule 59, the trial judge has the authority to weigh the evidence as if he or she were a member of the jury. 3 Charles Alan Wright, *Federal Practice and Procedure* § 553 at 247 (2d ed. 1982). As Charles Wright explains:

> [O]n a motion for a new trial—unlike a motion for a directed verdict or for judgment notwithstanding the verdict—the judge may set aside the verdict even though there is substantial evidence to support it. He is not required to take that view of the evidence most favorable to the verdict-winner. The mere fact that the evidence is in conflict is not enough to set aside the verdict. Indeed the more sharply the evidence conflicts, the more reluctant the judge should be to substitute his judgment for that of the jury. But on a motion for a new trial on the ground that the verdict is against the weight of the evidence, the judge is free to weigh the evidence for himself. Indeed it has been said that the granting of a new trial on the ground that the verdict is against the weight of the evidence 'involves an element of discretion which goes further than the mere sufficiency of the evidence. It embraces all the reasons which inhere in the integrity of the jury system itself.'

---

[3]In *McNeely*, this Court relied on syllabus point 3 from *Walker v. Monongahela Power Co.*, 147 W. Va. 825, 131 S.E.2d 736 (1963). In *Walker*, this Court was required to determine whether the trial court's decision not to grant a new trial was proper. The analysis in *Walker* is different from the analysis which should have been used in *McNeely* in order to determine whether this Court could reverse the trial court's order granting a new trial. We note that *McNeely, supra*, is a per curiam opinion. In syllabus point 2 of *Graf v. West Virginia University*, 189 W. Va. 214, 429 S.E.2d 496 (1992) we held: "A per curiam opinion that appears to deviate from generally accepted rules of law is not binding on the circuit courts, and should be relied upon only with great caution."

11 Wright, *supra* at § 2806 at 43-45 (1973) (footnotes omitted). After all, "[t]he trial judge was on the spot and is better able than an appellate court to decide whether the error affected the substantial rights of the parties." *Id.* at § 2818 at 119-20. Similarly, this Court has recognized when addressing the trial judge's authority to award a new trial that "[t]he trial court has opportunities to observe many things in the course of a trial which the printed record presented to an appellate court does not disclose[.]" *Browning v. Monongahela Transport Co.*, 126 W. Va. 195, 203, 27 S.E.2d 481, 485 (1943). The United States Court of Appeals of the Fourth Circuit has best explained the standard of review:

> A motion for a new trial is governed by a different standard from a directed verdict motion. . . . Under Rule 59 of the Federal Rules of Civil Procedure, a trial judge may weigh the evidence and consider the credibility of the witnesses and, if he finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, he must set aside the verdict, even if supported by substantial evidence, and grant a new trial.

Poynter v. Ratcliff, 874 F.2d 219, 223 (4th Cir. 1989) (citations omitted).

Therefore, to the extent that we have drifted in the past from the proper standard of review to be accorded to a trial judge's order which vacated the jury verdict and awarded a new trial, we clarify and hereafter emphasize that the role of the appellate court in reviewing a trial judge's determination that a new trial should be granted is very limited. Accordingly, we hold that a motion for a new trial is governed by a different standard than a motion for a directed verdict.[4] When a trial judge vacates a jury

---

[4]A directed verdict is a final judgment. Therefore, our standard of review is different for a directed verdict than for an order awarding a new trial:

(Continued on next page)

verdict and awards a new trial pursuant to Rule 59 of the *West Virginia Rules of Civil Procedure* the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion.

In light of these principles, did the trial judge abuse his discretion when he awarded a new trial? The trial judge's order indicates that he evaluated the evidence and credibility of the witnesses when making his decision. For example, the trial judge

---

(Continued)

" " 'Upon a motion to direct a verdict for the defendant, every reasonable and legitimate inference fairly arising from the testimony, when considered in its entirety, must be indulged in favorably to plaintiff; and the court must assume as true those facts which the jury may properly find under the evidence. Syllabus, *Nichols v. Raleigh-Wyoming Coal Co.*, 112 W. Va. 85 [, 163 S.E. 767 (1932)].' " Point 1, Syllabus, *Jenkins v. Chatterton*, 143 W. Va. 250 [, 100 S.E.2d 808](1957).' Syllabus Point 1, *Jividen v. Legg*, 161 W. Va. 769, 245 S.E.2d 835 (1978).

Syl. pt. 1, *Cale v. Napier*, 186 W. Va. 244, 412 S.E.2d 242 (1991).

Similarly, a judgment notwithstanding a verdict is a final judgment which, therefore, warrants a different standard of review than that for a new trial:

In reviewing a trial court's ruling on a motion for a judgment notwithstanding the verdict, it is not the task of the appellate court reviewing facts to determine how it would have ruled on the evidence presented. Its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, in ruling on a motion for a judgment notwithstanding the verdict, the evidence must be viewed in the light most favorable to the nonmoving party. If on review, the evidence is shown to be legally insufficient to sustain the verdict, it is the obligation of this Court to reverse the circuit court and to order judgment for the appellant.

Syl. pt. 1, *Mildred L.M. v. John O.F.*, No. 22037, ___ W. Va. ___, ___ S.E.2d ___ (Dec. 8, 1994).

stated that, not only did some of the appellants stipulate that their products were in the appellees' buildings, but also "there was more than substantial evidence that all (appellants) had products in one or more of the subject buildings." As we stated previously, a trial judge, unlike this Court, is in a unique position to evaluate the evidence and determine whether or not the evidence indicates that the appellants' products were in the building. Therefore, even though it may appear that the evidence was controverted as to whether or not the appellants' products were located in the appellees' buildings, we do not find the trial judge abused his discretion when he set aside the verdict and granted a new trial.

Additionally, the trial judge determined that the verdict was manifestly inadequate because there was "an abundance of evidence on the cost of maintenance, removal, and/or repair relating to the products." As we stated previously, the jury awarded no damages to the appellees. The appellants argue that they presented evidence that there would be no harm from their asbestos-containing products in the future.

A similar argument was made in *City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975 (4th Cir. 1987). In *Greenville*, the Court of Appeals of the Fourth Circuit affirmed the lower court's judgment which awarded compensatory and punitive damages to the City of Greenville for the presence of an asbestos-containing product in the city hall. The defendant, W.R. Grace & Company, argued that it was error for the jury to rely on the National Emission Standards for Hazardous Air Pollutants ["NESHAPS"] because there was no evidence that Greenville actually planned to renovate or demolish the city hall in the future; therefore, there would be no harm to the City of Greenville. The Fourth Circuit stated:

> This strikes us as a specious argument. It is obvious that the city hall will not last forever. It will have to be

> renovated or demolished at some time in the future, and when that day arrives, Greenville will be required to remove the [asbestos-containing product] from the building, if it has not already done so.

Id. at 982. *Cf. Beavercreek Local Schools v. Basic, Inc.*, 595 N.E.2d 360, 368 (Ohio Ct. App. 1991) ("We agree . . . that the jury's failure to award more than the cost of maintaining the asbestos is inexplicable in view of the uncontroverted testimony that Beavercreek [the plaintiff] would be faced with the necessity of removing the asbestos at the end of the life of the building[.]") In the case before us, the trial judge, in its unique role of being able to evaluate the evidence, could have found that the jury's failure to award any damages was "manifestly inadequate."

Lastly, the trial judge noted that "it appears to the Court that either the jury was not clearly instructed by the Court, or that the jury totally mis-comprehended the evidence." We agree with the trial judge. Our reading of the record revealed that there was confusion in the jury instructions as to whether the jury was to determine if the product was located in the building and if so, the amount of damages; or whether the jury was to also determine whether or not the product caused damage.

Indeed, we grant more deference to the trial judge who awards a new trial than we do to a trial judge who denies a new trial because "there is, ordinarily, lack of finality in the action of setting aside a verdict and granting a new trial." *Browning, supra* at 203, 27 S.E.2d at 485. Accordingly, based on our discussion above, we hold that it was not an abuse of discretion for the trial judge to vacate the jury verdict and award a new trial.

III.

The appellants raise additional issues for this Court to address in the event that we do not reinstate the jury verdict.

Specifically, the appellants raise issues regarding (1) whether a statute of limitations is applicable to the State; (2) whether the trial judge could find as a mater of law that the asbestos-containing products of the appellants are defective and, therefore, direct a verdict on liability against the appellants; (3) whether the trial judge should have disqualified himself from the trial; (4) whether the trial judge erred in striking the defense of assumption of risk; and (5) whether the trial judge erred in determining that appellant W.R. Grace & Co. is responsible for its predecessor's liabilities.

A.

The first additional issue, which could be dispositive of the case, is whether a statute of limitations runs against the State in an asbestos case. The appellants argue that the appellees' claim is barred pursuant to *W. Va. Code*, 55-2-12 [1959] which states that a tort claim must be brought "[w]ithin two years next after the right to bring the same shall have accrued[.]" The trial judge rejected this argument and applied the common law doctrine of *nullum tempus occurrit regi* ("time does not run against the King) and found that the statute of limitations does not run against the State in spite of the fact that *W. Va. Code*, 55-2-19 [1923] states: "Every statute of limitation, unless otherwise expressly provided, shall apply to the State."

W. Va. Code, 2-1-1 [1923] provides, in relevant part: "The common law of England, so far as it is not repugnant to the principles of the constitution of this state, shall continue in force within the same, except in those respects wherein it was . . . altered by the Legislature of this state." Furthermore, in the syllabus of *Perry v. Twentieth Street Bank*, 1457 W. Va. 963, 206 S.E.2d 421 (1974), this court stated "[b]y virtue of the authority of Article VIII, Section 21 of the Constitution of West Virginia

and of Code, 1931, 2-1-1 it is within the province of the Legislature to enact statutes which abrogate the common law.'' The legislature had the authority to enact *W. Va. Code*, 55-2-19 [1923]. Therefore, we conclude that *W. Va. Code*, 35-2-19 [1923] abrogates the common law doctrine of *nullum tempus occurrit regi* thereby making statutes of limitations applicable to the State.

Because the trial judge applied the doctrine of *nullum tempus occurrit regi* against the appellees, the trial judge did not reach the issues of whether the two-year statute of limitations found in *W. Va. Code*, 55-2-12 [1959] barred the appellees' claim or whether the discovery rule applies.[5] Therefore, we decline to address these latter two issues on appeal. *See* syl. pt. 1, *Shackleford v. Catlett*, 161 W. Va. 568, 244 S.E.2d 327 (1978) (" 'In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken.' Syllabus Point 1, *Mowery v. Hitt*, 155 W. Va. 103 [, 181 S.E.2d 334] (1971)").

B.

Second, we address whether the trial judge could find as a matter of law that the asbestos-containing products of the appellants are defective and, therefore, direct a verdict on liability against the appellants. The appellants argue that there was evidence which indicated that the products are not defective. Therefore, the appellants conclude that the issue of whether the asbestos-containing products are defective should have gone to the jury. Furthermore, the appellants contend that liability could not have been directed since the jury had to determine whether the products caused damage. The resolution of this issue is important

---

[5]The appellants correctly assert that this Court has adopted the discovery rule in product liability claims for personal injuries. *See Hickman v. Grover*, 178 W. Va. 249, 252, 358 S.E.2d 810, 813 (1987).

in determining whether the trial judge may find that the asbestos-containing products are defective as a matter of law and direct liability when this case is remanded for further proceedings, including a new trial.

The record before us is unclear as to how the trial judge came to his determination. It appears the trial judge took judicial notice that asbestos-containing products are defective as a matter of law. If this is the case, we assert that "[w]hile courts are permitted to take judicial notice of certain facts, it is well settled that a trial judge is not permitted to base a finding upon facts which are merely matters of his personal knowledge as distinguished from proof of such facts." *Boggs v. Settle*, 150 W. Va. 330, 338, 145 S.E.2d 446, 451 (1965). *See also* 1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, § 2-1(G) (3rd ed. 1994) ("A judge may not take judicial notice of adjudicative facts that are open to reasonable dispute, even if the judge is personally convinced of the correctness of a particular conclusion.")

Furthermore, the appellants contend that the trial judge applied the wrong standard when he stated in the September 14, 1993 order that the asbestos-containing products are defective as a matter of law because they are inherently dangerous. In *Morningstar v. Black & Decker Manufacturing Co.*, 162 W. Va. 857, 988, 253 S.E.2d 666, 683 (1979), this Court concluded that "in this jurisdiction . . . the general test for establishing strict liability in tort is whether the involved product is defective in the sense that it is not reasonably safe for its intended use." In the present case, it is unclear what standard the trial judge applied to determine when a product is defective.

The trial judge appears to have relied upon his own knowledge when he determined that asbestos-containing products are defective as a matter of law. We emphasize that if the trial judge makes the same decision on remand with regard to the products

being defective as a matter of law, then the trial judge must clearly indicate on the record how he came to that conclusion.

In this respect, a trial judge may take an issue from the jury in there are no questions of fact to be decided by the jury, but the trial judge may not remove a question of fact from the jury. §§ C.J.S *Trial* § 208(b) (1955). This Court has stated:

> the most fundamental rule of our system of jurisprudence is that questions of fact are to be determined by a jury and questions of law by a court . . . [I]t is just as well established in our law that where there is no evidence to support a verdict, or where it is against the plain preponderance of conflicting evidence, or the governing facts are not in dispute so that reasonable minds could draw but one conclusion therefrom, the questions . . . are for judicial determination as a matter of law.

Fitzwater v. Spangler, 150 W. Va. 474, 147 S.E. 2d 294, 296 (1966) *(citing Petros v. Kellas*, 146 W.Va. 619,122 S.E. 2d 177 (1961) which held in syllabus point 4: " 'When the material facts are undisputed and only one inference may be drawn from them by reasonable minds the questions of negligence and contributory negligence are questions of law for the court.' Point 3, syllabus, *Graham v. Crist*, 146 W.Va. 156 [, 188 S. E. 2d 640 (1961)]." *citing also Wood v. Shrewsbury*, 177 W. Va. 569, 186 S.E. 2d 294 (1936).

Furthermore, our review of the record indicates it is not clear as to whether or not the trial judge directed a verdict on liability, although the order to which we refer previously in this opinion states "[t]he Court DIRECTED LIABILITY as a matter of law[.]" We acknowledge that a trial judge may direct a verdict:

> 'Where the evidence given on behalf of the defendant is clearly insufficient to support a verdict for him so that

> such verdict, if returned by a jury, must be set aside, and the evidence of the plaintiff is clear and convincing, it is the duty of the trial court, when so requested, to direct a verdict for the plaintiff.' Point 5 Syllabus, *Sommerville v. The Pennsylvania Railroad Co.*, 151 W. Va. 709 [, 155 S.E. 2d 865 (1967)].

Syl. pt. 4, *Jones, Inc. v. W. A. Wiedebusch Plumbing and Heating Co.*, 157 W. Va. 257, 201 S.E. 2d 248 1973).

In the case now before us, however, the jury instructions are not clear as to whether liability was directed. At one point, the jury instructions indicate that, although the asbestos-containing products are defective as a matter of law, the jury still must determine whether the products caused damage and, if so, what the amount of damages are. At another point, the jury instructions indicate that if the jury finds that the product is located in the appellants' buildings, then the jury must award damages. These conflicting instructions need to be resolved.

In *Morningstar, supra*, this Court explains that in a product liability case, the initial inquiry is whether the product is defective and, if so, did it cause damage. The next inquiry is the amount of monetary damages. Therefore, on remand, if the trial judge directs a verdict on liability, he must clearly explain in the record the reasons for his decision.

C.

Third, we address whether the trial judge erred in refusing to disqualify himself after announcing, prior to the presentation of the appellants' case, that in-place asbestos-containing products are defective as a matter of law and as a matter of fact. The appellants argue that the trial judge violated Canon 3C of the *West Virginia Judicial Code of Ethics* which states, in relevant

part: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned[.]"[6]

Although the appellants raise this issue as an assignment of error, this issue is more appropriately disposed of pursuant to Rule XVII of the *West Virginia Trial Court Rules for Trials of Record* (Rule XVII outlines the proper procedure for disqualifying a judge). Therefore, we decline to address this issue.

However, we note that our review of the record indicates that there were statements made by the trial judge which may have been intemperate. Although a trial judge need not be muzzled, we caution the trial judge to exercise more restraint in making comments with regard to the merits or lack of merits of a party's position without proper support. Obviously, impartiality in a judge is of the utmost importance to instill confidence in the judiciary.

D.

Fourth, we address whether the trial judge erred in striking the defense of assumption of risk. At the outset, we note:

> The defense of assumption of risk is available against a plaintiff in a product liability case where it is shown that the plaintiff had actual knowledge of the defective or dangerous condition, fully appreciated the risks involved, and continued to use the product. However, the plaintiff is not barred from recovery unless his degree of fault under assumption of risk equals or exceeds the combined fault of the other parties to the accident.

Syl. pt. 3, *King v. Kavak Manufacturing Corporation*, 182 W. Va. 276, 387 S.E.2d 511 (1989). Additionally, we have stated:

---

[6]Currently, the comparable sections can be found in Canon 3E (1) of the *West Virginia Code of Judicial Conduct*. The *West Virginia Code of Judicial Conduct* became effective on January 1, 1993.

> ' "Where [in a trial by jury] there is competent evidence tending to support a pertinent theory in the case, it is the duty of the trial court to give an instruction presenting such theory when requested to do so. *McAllister v. Weirton Hospital Co.*, 173 W. Va. 75, 81, 312 S.E. 2d 738, 744 (1983) (citations omitted)." Syl. pt. 2, *Brammer v. Taylor*, 175 W. Va. 728, 338 S.E. 2d 207 (1985).' Syllabus Point 2, *Ventura v. Winegardner*, 178 W. Va. 82, 357 S.E. 2d 764 (1987).

Syl. pt. 6, *King, supra.*

The appellants state the evidence indicates that as early as 1946 the State issued a respiratory equipment bulletin designed to protect West Virginia workers from exposure to asbestos and silica. The record discloses the bulletin lists approved respiratory devices to protect against the inhalation of asbestos. However, this does not in and of itself indicate the State had actual knowledge of a dangerous or defective condition.

The appellants also assert that in 1951 the State adopted regulations regarding threshold limits of exposure to asbestos. However, the appellants do not indicate where in the record it states the appellees had actual knowledge that the asbestos levels in the state buildings were above the threshold limits. Accordingly, we conclude, based upon the above information, the trial judge could determine that the evidence was not sufficient to support an instruction on assumption of risk. We find no error in the trial judge's ruling.

E.

Finally, we address whether the trial judge erred in refusing to grant a direct verdict or to charge the jury on the issue of successor liability. W. R. Grace & Co. (hereinafter "Grace") is the only appellant raising this issue.

In syllabus points 2 and 3 of *Davis v. Celotex Corporation*, 187 W. Va. 566, 420 S.E. 2d 557 (1992) this Court held:

> 2. At common law, the purchaser of all the assets of a corporation was not liable for the debts or liabilities of the corporation purchased. This rule has since been tempered by a number of exceptions and statutory provisions.
>
> 3. A successor corporation can be liable for the debts and obligations of a predecessor corporation if there was an express or implied assumption of liability, if the transaction was fraudulent, or if some element of the transaction was not made in good faith. Successor liability will also attach in a consolidation or merger under W. Va. Code, 31-1-37(1)(5) (1974). Finally, such liability will also result where the successor corporation is a mere continuation or reincarnation of its predecessor.

With this in mind, we address Grace's contentions.

Grace purchased certain assets of the Zonolite Company on April 10, 1963, pursuant to an Agreement and Plan of Reorganization. Grace contends that under the agreement it assumed only the debts and liabilities of Zonolite which existed at the closing of the purchase of Zonolite. Therefore, it is not responsible for claims caused by asbestos-containing materials manufactured and sold by Zonolite prior to the closing of the purchase of Zonolite.

However, as we stated above, a company may be liable if it impliedly assumes liability or is a mere continuation or reincarnation of its predecessor. The appellees assert that Grace acquired all of Zonolite's assets and continued to manufacture the same products as Zonolite. Therefore, the trial judge could

conclude that Grace impliedly assumed responsibility or that it is a mere continuation or reincarnation of its predecessor.[7]

Accordingly, we cannot conclude that the trial judge erred on this issue.[8]

IV.

Accordingly, we affirm the September 14, 1993 order of the Circuit Court of Monongalia County to the extent the trial judge vacated the jury verdict and awarded a new trial. The case will be remanded and further proceedings will be held in accordance with the principles set forth in this opinion.

Affirmed, in part,
reversed, in part,
and remanded.

---

[7]Similarly, other courts have found that Grace is responsible for the obligations of Zonolite. *See Harashe v. Flintkote Co.*, 848 S.W. 2d 506, 509 (Mo. Ct. App. 1993) (the court held that "[w]hile the [Grace-Zonolite Agreement] was delineated as a reorganization through a purchase of assets it contained all the elements of a *de facto* merger.") and *T.H.S. Northstar Assocs. v. W. R. Grace & Co.—Conn.*, 840 F. Supp. 676, 679 (D. Minn. 1993) (The court found that the elements of a *de facto* merger were present since Grace assumed the obligations of Zonolite, the Zonolite shareholders became Grace stockholders, and Grace paid for Zonolite assets solely with shares of its own stock rather than with cash.) ***But see East Prairie R-2 School District v. U.S. Gypsum Co.***, 813 F. Supp. 1396 (E.D. Mo. 1993) (Grace held not to be responsible for its predecessor's (Zonolite) liabilities.)

[8]The appellants also raised the following issues: whether a new trial should be granted with respect to buildings for which product identification was not conceded and whether a new trial should be granted on punitive damages. However, because of our holding in part II, *supra*, there is no need to address these issues.

Cleckley, Justice, concurring:

I am pleased to concur in Justice McHugh's fine opinion. I particularly agree with his analysis regarding the broad discretion and the scope of authority of the trial court to set aside a jury's verdict as being against the weight of the evidence. I write separately, however, just to make explicit what is implicit in the analysis of the opinion: that a trial court in West Virginia has authority in determining a motion for a new trial under Rule 59 of the West Virginia Rules of Evidence to weigh the persuasive quality of the evidence and that our prior cases to the contrary are overruled.[1] Several of our prior cases, such as *Addair v. Majestic Petroleum Co., Inc.*, 160 W. Va. 105, 232 S.E.2d 821 (1977), held that the trial court's authority to review a jury's verdict was the same as that of an appellate court. This case sounds the death knell for *Addair* and its progeny. Indeed, several of *Addair's* express or implicit declarations would not stand the test of time and its holding limiting the scope of the reviewing authority of the trial court to only that of an appellate court had long been a rule searching for a rationale. Today's decision puts a long overdue end to the fruitless search. By broadening the authority of trial courts and limiting that of the appellate court, we strike a decent note for judicial restraint and judicial economy.[2]

---

[1]We merely are upholding the right of a trial court to grant a new trial when it believes that substantial justice has not been done on the theory that it is an exercise of the trial court's inherent power.

[2]Clearly, granting a trial court broad latitude in granting or denying motions for a new trial is consistent with the principles of judicial economy. Here, the trial court, before losing jurisdiction of a case, is permitted to correct errors that it or the jury might have made during the course of the trial. Furthermore, giving the trial court this power to achieve justice may encourage litigants more forcefully to pursue the issues below rather than in a full blown and costly appeal.

As suggested above, our prior cases indicated that the test for granting a new trial approximated the test for a directed verdict.[3] Although today's decision does not go so far to state that the trial court may order a new trial where there is any evidence which would support a judgment in favor of the nonmoving party,[4] any notion that the tests for a new trial and for a directed verdict are equated is, of course, laid to rest. What we have done is take an intermediate position which I will now attempt to summarize.

The decision to grant or deny a new trial rests within the sound discretion of the trial court, and we review this decision for a clear abuse of discretion. *See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S. Ct. 2909, 106 L.Ed.2d (1989). Absent a clear abuse of discretion, we will not disturb this decision; indeed, our position is the same as the federal test that the trial court's decision is the same as the federal test that the trial court's decision " 'is not reviewable upon appeal, save in the most exceptional circumstances[.]' " *Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162, 168 (4th Cir. 1985), *quoting Aetna Cas. & Sur. Co. v. Yeatts*, 122 F.2d 350, 354 (4th Cir. 1941).[5]

---

[3]Some jurists have suggested there is some similarity between these two tests and the difference is one of degree. There can be little disagreement that they differ substantially to the extent of control over jury verdicts exercised by the trial court. *See* Philip A. Trautman, *Motions Testing the Sufficiency of Evidence*, 42 Wash. L. Rev. 787 (1967).

[4]Under this theory, a trial court becomes a "thirteenth juror" upon hearing a motion for a new trial. The trial court weighs the evidence independently to determine whether there is sufficient evidence to support the verdict.

[5]The federal test is summarized in the famous statement of Judge Parker in *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d at 352:

> "On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may

(Continued on next page)

Justice McHugh correctly states that this power of the trial court should be exercised sparingly. Even if the trial court disagrees with the verdict, it should accept the jury's findings on credibility matters unless the verdict is clearly against the manifest weight of the evidence where the jury acted under some mistake or under some improper motive, bias, or feelings. The most important feature of the rule we adopt today is that enforcement of these limitations of the trial court's authority is committed largely to the self-restraint of the trial court and reversals on appeal are to be rare. Greater latitude should be allowed a trial court in granting a new trial than in denying a new trial.[6]

This decision is committed to the discretion of the trial court because it "is in a position to see and hear the witnesses and is able to view the case from a perspective that an appellate court can never match." *Weil v. Seltzer*, 873 F.2d 1453, 1457 (D.C. Cir. 1989). Given the trial court's intimate familiarity with the proceedings, the trial court "may weigh evidence and assess credibility in ruling on the motion for a new trial." *Wilhelm v. Blue Bell, Inc.*, 773 F.2d 1429, 1433 (4th Cir. 1985), *cert. denied*, 475 U.S. 1016, 106 S. Ct. 1199, 89 L.Ed.2d 313 (1986). There are many critical events that take place during a trial that cannot be reduced to record, which may affect the mind of the judge as well as the jury in forming the opinion as to the weight of the evidence and the character and credibility of the witnesses.

(Continued)

be substantial evidence which would prevent the direction of a verdict."

See also Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36, 101 S. Ct. 188, 190, 66 L.Ed.2d 193, 197 (1980) (order granting new trial is to appealable and "rarely, if ever, will justify the issuance of a writ of mandamus").

[6]The mere fact there is little discussion of the merits of the evidence in the trial court's granting or denial of a motion for a new trial is not grounds for reversal. *See Ellis v. International Playtex, Inc.*, 745 F.2d 292 (4th Cir. 1984).

These considerations can and should not be ignored in determining whether a new trial was properly granted. The Eleventh Circuit has observed that these principles are particularly apt even in cases where the motion is denied. *See Blu-J, Inc. v. Kemper C.P.A. Group*, 916 F.2d 637 (11th Cir. 1990). Thus, in future cases, it is with this circumscribed scope of appellate review that we should review the granting or denial of a new trial.

— CORRECTED COURT MANDATE —

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 21st day of December, 1994, the following order was made and entered:

In Re: State of West Virginia Public Building Asbestos Litigation

No. 22023

AND

In Re: State of West Virginia Public Building Asbestos Litigation

No. 22024

AND

In Re: State of West Virginia Public Building Asbestos Litigation

No. 22025

The Court, having maturely considered the appendices, the Amicus Curiae tendered on behalf of Armstrong World Industries, Inc., and the oral argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is error in the judgment of the Circuit Court of Monongalia County, rendered on the 1st day of June, 1993, but not such as to require reversal of the entire judgment. It is therefore considered and ordered that said judgment is affirmed insofar as the circuit court's ruling vacating the jury verdict and awarding a new trial, the circuit court's determination that the evidence was not sufficient to support an instruction on assumption of risk and the circuit court's ruling on the issue of successor liability, but insofar as the circuit court's determination of the defectiveness of asbestos-containing products and of the application of *nullum tempus occurrit regi*, the same is reversed, set aside and

annulled. AND this action is remanded to the Circuit Court of Monongalia County for further proceedings, according to the principles stated and directions given in the written opinion aforesaid, and further according to law; all of which is ordered to be certified to the Circuit Court of Monongalia County.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Justice McHugh, was concurred in by Acting Chief Justice Neely and Justices Workman and Cleckley. Justice Cleckley reserves the right to file a concurring opinion. Chief Justice Brotherton and Retired Justice Miller, sitting by temporary assignment, did not participate in the decision of this case.

A True Copy

Attest: /s/ ANCIL G. RAMEY

Clerk, Supreme Court of Appeals

APPENDIX B

IN THE CIRCUIT COURT OF MONONGALIA COUNTY,
WEST VIRGINIA
Division 1

STATE OF WEST VIRGINIA,
PUBLIC BUILDING ASBESTOS LITIGATION

Civil Action No. 86-C-458

MEMORANDUM ORDER

On the 17th day of May, 1993, this matter came before the Court for Arguments on the Post-Trial Motions of the parties. The plaintiff, State of West Virginia, was represented by Silas Taylor, R. Terri Mandel, and Thomas R. Sheran. Defendant W.R. Grace appeared represented by James Restivo, Larry Flatley, and Frank E. Simmerman, Jr. Defendant Asbestospray appeared represented by Robert Brownson, Diana Everett, and Dan Ruley. Defendant Keene Corporation appeared represented by Laura V. Jones and William L. Ballard. Defendant Pfizer appeared represented by Charles R. Bruton, Lisa Kill, and Rebecca L. Stepto.

The Court was presented with the following motions for consideration:

(1) Plaintiffs' Motion for Costs;

(2) Plaintiff's Motion for Partial Judgment Notwithstanding the Verdict as to each Respective Defendant;

(3) Plaintiff's Motion for New Trial Against All Defendants;

(4) Plaintiff's Supplemental Motion for Conditional Additur; and

(5) Defendant W.R. Grace's Conditional Motion for Post-Trial Relief.

DISCUSSION

With respect to the first motion, Plaintiffs' Motion for Costs, the Court does not agree with the Plaintiffs' contention that they were the prevailing parties in this matter. The Court does agree that liability as a matter of law was directed by the Court, but it was limited. At the close of the evidence, the Court directed liability as a matter of law that asbestos-containing products are inherently dangerous products, leaving for the jury the issue of whether the plaintiffs have proven that the respective defendants had such products in the buildings at issue, and, if so, the damages resulting from their presence. A verdict of "0" with respect to each of the four defendants cannot be interpreted by the Court as anything other than the defendants being the prevailing parties.

Plaintiffs' Motion for Partial Judgment Notwithstanding the Verdict will not be granted, but rather dispositive action will be taken based on the Motion for a New Trial, in lieu of this motion.

The Court believes that the Plaintiffs' Motion for a New Trial Against All Defendants is well taken. The Court DIRECTED LIABILITY as a matter of law that asbestos-containing products are inherently dangerous products. This left for the jury the issue of whether the plaintiffs proved that the respective defendants had such products in the buildings at issue, and, if so, the damages resulting from their presence. Therefore, the Court did not direct liability as to any one or more specific defendants. However, during the trial, on the issue of product identification, the existence of a defendant's product was admitted to be in several of the plaintiff 's buildings by more than one of the defendants. Additionally, there was more than substantial

evidence that all defendants had products in one or more of the subject buildings.

There was also an abundance of evidence on the cost of maintenance, removal, and/or repair relating to the products. Nevertheless, the jury returned a verdict of "0" damages. This verdict is manifestly inadequate given the proof presented in the trial of this matter. In *Freshwater v. Booth*, 160 W. Va. 156, 233 S.E.2d 312 (1977), the Court promulgated a set of rules for the "classification of inadequate judgments." In *Freshwater*, the Court labeled a "Type 1" inadequate award as one:

> where the plaintiff would have been entitled to a directed verdict on liability as a matter of law, and the damages are inadequate even when viewed most strongly in favor of the defendant. In this type of case, an appellate court need not agonize about reversing and remanding for a new trial . . . .

Id. at 315. Because the Court ruled that the products were defective as a matter of law, and because there was evidence on the costs relating to the products, this Court is of the opinion that the "0" verdict in this case represents a "Type 1" verdict as just described. Furthermore, it appears to the Court that either the jury was not clearly instructed by the Court, or that the jury totally miscomprehended the evidence. Therefore, since the verdict is wholly inconsistent with the evidence when considered with appropriate law and Court rulings, a new trial must be granted in this case as to all defendants.

Next, the Court considered the Plaintiffs' Motion for Additur. This Motion should be denied as being inconsistent with the rulings of the Court.

Finally, on the Defendant, W.R. Grace's Motion for Post-Trial Relief, the Court generally denies this motion and will address the limitations on the retrial subsequently in this order.

RULINGS

In consideration of the foregoing, the Court hereby ORDERS that:

(1) Plaintiffs' Motion for Costs is DENIED;

(2) Plaintiff's Motion for Partial Judgment Notwithstanding the Verdict as to each Respective Defendant is DENIED;

(3) Plaintiff's Motion for New Trial Against All Defendants is GRANTED;

(4) Plaintiff's Supplemental Motion for Conditional Additur is DENIED; and

(5) Defendant W.R. Grace's Conditional Motion for Post-Trial Relief is DENIED.

The Court Further ORDERS that the only issues at the New Trial shall be 1) product identification, and 2) damages. Also, the Court ORDERS that the New Trial shall be limited to 30 trial days based upon a schedule hereafter to be determined. The rulings contained herein are ORDERED stayed for four months from the date of this order.

ENTER: September 14, 1993

/s/ LARRY V. STARCHER

JUDGE

APPENDIX C

ADMINISTRATIVE ORDER
SUPREME COURT OF APPEALS OF WEST VIRGINIA

RE: **IN RE: STATE OF WEST VIRGINIA PUBLIC BUILDING ASBESTOS LITIGATION,** MONONGALIA COUNTY CASE NO. 86-C-458

WHEREAS, the Honorable Larry V. Starcher, Judge of the Seventeenth Judicial Circuit, has advised the Chief Justice of the Supreme Court of Appeals of a motion filed for his disqualification from presiding in the above-styled proceeding; and

WHEREAS, Judge Starcher has further advised the Chief Justice that he does not desire to recuse himself voluntarily from presiding in said case; and

WHEREAS, upon review of said Motion and Plaintiff's Memorandum in Opposition thereto, in accordance with Rule XVII(a)(3)(B)(i), the Acting Chief Justice has determined that the matters set forth in the Motion for Disqualification are facially insufficient to warrant such disqualification;

IT IS THEREFORE ORDERED that the Honorable Larry V. Starcher, Judge of the Seventeenth Judicial Circuit, be, and he hereby is, directed to continue to preside in the above-referenced case; and

IT IS FURTHER ORDERED that the Circuit Clerk of Monongalia County record this order in the office of the said Clerk and that proceedings be held in the manner provided by law.

ENTERED: MARCH 13, 1995

/s/ THOMAS E. MCHUGH

THOMAS E. McHUGH
Acting Chief Justice

APPENDIX D

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 2nd day of February, 1995, the following order was made and entered:

In Re: State of West Virginia Public Building Asbestos Litigation

No. 22023 (W. R. Grace)

AND

In Re: State of West Virginia Public Building Asbestos Litigation

No. 22024 (Pfizer)

AND

In Re: State of West Virginia Public Building Asbestos Litigation

No. 22025 (Asbestospray)

The Court, having maturely considered the petitions for rehearing and reargument filed in the above-captioned cases, is of opinion to, and doth hereby, deny the prayer of the petitioners and doth hereby order that the final order entered herein be made absolute and certified as heretofore directed. Justice Brotherton did not participate. Retired Justice Miller, sitting by temporary assignment, did not participate in the consideration or decision of the above-captioned cases.

A True Copy

Attest: /s/ ANCIL G. RAMEY

Clerk, Supreme Court of Appeals

NO. 94-1822

SUPREME COURT, U.S.
FILED
JUN 3 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

IN RE: STATE OF WEST VIRGINIA
PUBLIC BUILDING ASBESTOS LITIGATION.

On Petition for Writ of Certiorari to the West Virginia Supreme Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

DARRELL V. McGRAW, JR.
Attorney General
SILAS B. TAYLOR
Managing Deputy
Attorney General
State of West Virginia
State Capitol
Room 26-E
Charleston, WV 25305
(304) 558-2021

Attorneys for Respondent
State of West Virginia

THOMAS R. SHERAN
Counsel of Record
MOSS & BARNETT
4800 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 347-0300

Attorneys for Respondents
State of West Virginia,
City of Spencer, West Virginia and
the Monroe County Commission,
Monroe County, West Virginia

6884
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Whether the alleged personal bias or prejudice of the trial judge deprived Petitioners of their constitutional right to due process of law.

2. Whether the Supreme Court will review an issue first raised below on petition for rehearing, where the issue could have earlier been raised, but was not.

3. Whether the opinion below is a "final judgment or decree" within the meaning of 28 U.S.C. § 1257.

LIST OF PARTIES

Petitioners are W.R. Grace & Co. -Conn., Pfizer Inc. and Asbestospray Corporation who are appellants below.

Respondents are the State of West Virginia, City of Spencer, West Virginia and the Monroe County Commission, Monroe County, West Virginia who were appellees below.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Summary of the Argument	5
Reasons for Denying the Writ	5
I. Petitioners' allegations of personal bias or prejudice do not implicate constitutional due process.	5
II. Petitioners failed to raise below the issue presented to this Court.	7
III. This Court has no jurisdiction under 28 U.S.C. § 1257 because the orders below are not "final judgments or decrees."	8
Conclusion	11

Page

TABLE OF CITATIONS

Cases Cited:

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) 6, 8

American Surety Co. v. Baldwin, 287 U.S. 156 (1932) ... 8

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 9

Cox Broadcasting Corp. v. Cohen, 420 U.S. 469 (1975) .. 9, 10

Gospel Army v. City of Los Angeles, 331 U.S. 543 (1946) 9

FTC v. Cement Institute, 333 U.S. 683 (1948) 5

In re City of Detroit, 828 F.2d 1160 (6th Cir. 1987) 9

In re Corrugated Container Antitrust Litigation, 614 F.2d 958 (5th Cir.), *cert. denied*, 449 U.S. 888 (1980) 9

In re Murchison, 349 U.S. 133 (1955) 6

Liteky v. United States, 114 S. Ct. 1147 (1994) 6

Robinson v. Largent, 419 F.2d 1327 (3d Cir. 1970) 9

Tumey v. Ohio, 273 U.S. 510 (1927) 5, 6

Contents

	Page
United States v. Washington, 573 F.2d 1121 (9th Cir. 1978)	9
Vuono v. United States, 441 F.2d 271 (4th Cir. 1971)	9
Ward v. Village of Monroeville, 409 U.S. 57 (1972)	6
Statutes Cited:	
28 U.S.C. § 144	6, 9
28 U.S.C. § 455(a)	6
28 U.S.C. § 1257	i, 5, 8, 10
28 U.S.C. § 1257(a)	2
28 U.S.C. § 1291	9
West Virginia Code § 58-5-1	2, 3
United States Constitution Cited:	
First Amendment	10
Rule Cited:	
West Virginia Trial Court Rule for Trial of Record XVII	2, 4
West Virginia Trial Court Rule for Trial of Record XVII(f)	5, 9

Contents

Page

APPENDIX

Appendix A — West Virginia Code 1966 Chapter 50, Appeal and Error, Article 5, Appellate Relief in Supreme Court of Appeals 1a

Appendix B — West Virginia Trial Court Rules for Trial Courts of Record 3a

To The Honorable Supreme Court:

The Respondents, State of West Virginia, City of Spencer, West Virginia, and Monroe County Commission, Monroe County, West Virginia respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioners, W.R. Grace & Co. -Conn., Asbestospray Corporation and Pfizer, Inc.

OPINIONS BELOW

The order of the Circuit Court of Monongalia County, West Virginia granting Respondents' motion for a new trial is unpublished; however, the order is reproduced in the appendix to the Petition for Certiorari (App. B, 31a-34a).

On December 21, 1994, the West Virginia Supreme Court of Appeals affirmed the trial court's order granting a new trial, but reversed the trial court's order with respect to the statute of limitations, and remanded for further proceedings regarding the trial court's determination that Petitioners' products were defective as a matter of law. The court's opinion is reported at 454 S.E. 2d 413 (W. Va. 1994) and appears as Appendix A to the Petition for Writ of Certiorari.

On February 2, 1995, the West Virginia Supreme Court of Appeals denied the Petitioners' joint petition for rehearing filed by W.R. Grace & Co.-Conn. and joined by Asbestospray Corporation and Pfizer Inc. The court's order denying the joint petition is unreported; but it is reproduced in the appendix to the Petition for Writ of Certiorari (App. D, 36a).

On March 13, 1995, the Acting Chief Justice of the West Virginia Supreme Court of Appeals, acting in an administrative capacity, denied Petitioner W.R. Grace & Co.-Conn.'s motion to prospectively disqualify the Honorable Larry V. Starcher from

presiding over the anticipated new trial. The administrative order denying disqualification is unreported; but it appears as Appendix C to the Petition for Writ of Certiorari (App. C, 35a).

STATEMENT OF JURISDICTION

Petitioners purport to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a). However the question presented to this Court was neither properly presented to nor decided by the court below, nor is the opinion sought to be reviewed a final judgment or decree.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those constitutional and statutory provisions cited by the Petitioner, Respondents submit the following to this Court:

> West Virginia Code § 58-5-1 (reproduced as Respondent's Appendix A).
>
> Rule XVII, trial court rules for trial courts of record of the State of West Virginia (reproduced as Respondents' Appendix B).

STATEMENT OF THE CASE

The question presented to this Court could have been, but was not properly presented to the court below.

This is an asbestos property damage case in which the trial court, at the close of all the evidence, instructed the jury that Petitioner's asbestos-containing building materials are defective as a matter of law under West Virginia's law of product liability.

Because of statements made at the close of Petitioners' case regarding the product defect issue, W.R. Grace & Co. and Pfizer, Inc., (but not Asbestospray Corporation) moved the trial judge to disqualify himself. The trial court denied that motion.

Because the trial judge instructed the jury that Petitioners' products are defective, "[t]his left for the jury the issue of whether the plaintiffs proved that the respective defendants had such products in the building at issue, and if so, the damages resulting from their presence." (App. B, 32a).

Notwithstanding the foregoing instruction, the jury awarded "0" damages against each of the Petitioners. The trial court granted Respondents' motion for a new trial on product identification and damages because "the existence of Defendants' products was admitted to be in several of the Plaintiffs' buildings by more than one of the Defendants," and because "[t]here was also an abundance of evidence on the cost of maintenance, removal, and/or repair relating to the products [in those buildings]." (App. B, 32a-33a).

In their Joint Petition for appellate review of the trial court's order granting a new trial,[1] Petitioners argued that the jury verdict should be reinstated on the basis of the record and instructions below, including the instruction with respect to product defect. (Joint Brief for Appellants, p. 6). Petitioners sought review of the product defect instruction only if the West Virginia Supreme Court of Appeals affirmed the order granting a new trial. In that event, Petitioners urged the court to "[r]everse the ruling that,

---

1. The appellate jurisdiction of the West Virginia Supreme Court of Appeals is not limited to final judgments. Unlike the jurisdictional statutes of many state courts, West Virginia Code § 58-5-1 specifically provides: "In any civil case where there is an order granting a new trial or rehearing, an appeal may be taken from the order without waiting for the new trial or rehearing to be had." (Resp. App. A).

notwithstanding a wealth of evidence to the contrary, 'all' ACM's are 'inherently dangerous and therefor "defective" as a matter of law.' " (Joint Brief of Appellants, p. 7).

The Supreme Court of Appeals affirmed the order granting a new trial, subject to its instruction that, ". . . if the trial judge makes the same decision on remand with regard to the products being defective as a matter of law, then the trial judge must clearly indicate on the record how he came to that conclusion." (App. A, 18a-19a).

Petitioners also assigned as error the trial court's refusal to recuse himself, but Petitioners carefully limited the relief sought to a request that the court direct recusal only with respect to any new trial awarded. (Joint Brief of Appellee, p. 43).[2] The West Virginia Supreme Court of Appeals properly noted that the issue of whether the trial judge should be recused from hearing the new trial ". . . is more appropriately disposed of pursuant to Rule XVII of the *West Virginia Trial Court Rules for Trial of Record* (Rule XVII outlines the proper procedure for disqualifying a judge.)" (App. A, 21a).

Only W.R. Grace & Co. thereafter elected to seek to disqualify the trial judge from hearing the new trial under Rule XVII, basing its motion on the statements that were made by the trial judge when expressing his opinion that Petitioners' products are defective as a matter of law. When the trial judge declined to voluntarily recuse himself, Grace's disqualification motion was submitted to the Acting Chief Justice of the West Virginia Supreme Court of Appeals, who, acting in an administrative (non-judicial) capacity, pursuant to Rule XVII, denied the motion because the trial court's statements were "facially insufficient" to

---

2. Petitioner did *not* seek to vacate the order granting a new trial, on this ground, until their petition for rehearing.

warrant disqualification (App. D, 35a). W.R. Grace & Co. did not seek judicial review of this decision by writ of prohibition or other extraordinary writ as contemplated by Rule XVII(f). (Resp. App. B, 3a).[3]

SUMMARY OF THE ARGUMENT

1. Petitioners' allegations of personal bias or prejudice on the part of the trial judge do not implicate constitutional due process of law.

2. Petitioners failed to timely raise below the issues presented to this Court.

3. This Court has no jurisdiction under 28 U.S.C. § 1257 because the orders below are not "final judgments or decrees".

REASONS FOR DENYING THE WRIT

I.

PETITIONERS' ALLEGATIONS OF PERSONAL BIAS OR PREJUDICE DO NOT IMPLICATE CONSTITUTIONAL DUE PROCESS.

This Court has instructed that not all questions of judicial qualification implicate the due process clause. "[M]atters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). *See also, FTC v. Cement Institute*, 333 U.S. 683, 702 (1948) ("[M]ost matters

---

3. The Petition incorrectly states that W.R. Grace's motion to recuse the judge from hearing the new trial was presented to the West Virginia Supreme Court of Appeals. (Petition, p. 7).

relating to judicial disqualification [do] not rise to a constitutional level").

The due process clause can be implicated in cases involving judicial self-interest. But this is not a situation in which a trial judge sat in judgment of his own case. *In re Murchison,* 349 U.S. 133, 136 (1955). Nor have Petitioners shown that the trial judge is or was motivated by a self-interest that is "direct, personal, substantial, [and] pecuniary." *Ward v. Village of Monroeville,* 409 U.S. 57, 60 (1972); quoting *Tumey v. Ohio, supra.* Indeed, Petitioners make no claim that the trial judge had any personal interest whatsoever in the outcome of this case. Rather, they claim that, under state law, the trial court may not rely on prior rulings to dispose of issues arising at trial.

Regardless of whether Petitioners' allegations of "personal bias" or "prejudice" warranted disqualification as a matter of state policy,[4] they do not involve the kind of judicial self-interest that this Court has recognized as implicating a litigant's constitutional right to due process of law. *See Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 820-23 (1986).

---

4. Respondents do not concede that recusal was or is warranted in this case. This Court has adopted the "extrajudicial source" doctrine (or factor) when analyzing whether a federal trial judge's personal bias warrants recusal under 28 U.S.C. § 144 or 455(a). *Liteky v. United States,* 114 S. Ct. 1147 (1994). Under this standard Judge Starchers alleged "bias" would not have warranted recusal because "[o]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the *current proceedings, or of prior proceedings,* do not constitute a basis for a bias or partiality motion unless they display a deep seated favoritism or antagonism that make fair judgment impossible." *Id.* at 1157 (emphasis added).

II.

PETITIONERS FAILED TO RAISE BELOW THE ISSUE PRESENTED TO THIS COURT.

Petitioners contend that, because the trial judge was charged with personal bias, the West Virginia procedure authorizing him to grant a new trial based on his evaluation of the evidence offends traditional notions of fairness that are incorporated in the due process clause. This constitutional challenge to the procedure for granting new trials was not properly presented to either the trial or appellate court below.

W.R. Grace & Co. and Pfizer Inc., requested recusal during the trial, but their request was based on the ground that the trial judge had pre-judged the product defect issue — an issue which was *not* submitted to the jury. When Respondents moved for a new trial on the issues that *were* submitted to the jury (product identification and damages), none of the Petitioners asked the trial judge to recuse himself from considering that motion. And after the trial court granted a new trial as to product identification and damages, none of the Petitioners asked the West Virginia Supreme Court of Appeals to vacate the new trial order based on the trial judge's alleged bias, but rather sought review thereof only on its merits.

Petitioners' request that the Supreme Court of Appeals review the trial judge's refusal to recuse himself was expressly limited to a recusal only in connection with the new trial.[5] The reason why Petitioners did not challenge the new trial order itself on this ground is obvious. If the trial court should have recused

5. "In the event this Court does not reinstate the verdict in its entirety, Judge Starcher should not participate in any further proceedings, his pretrial and trial rulings should be vacated and any new trial should be on all liability issues." (Joint Brief of Appellants, p. 43).

itself during trial, the remedy would be a new trial before a different judge, *not* reinstatement of the verdict.

Petitioners' constitutional challenge to the trial judge's qualification to hear the new trial motion was not raised until after the Supreme Court of Appeals had reviewed the new trial order and found no abuse of discretion. This tactic smacks of seeking "two bites at the apple." The due process clause does not afford Petitioners the right to await the outcome of their appeal on the merits before questioning the constitutionality of permitting the trial judge to participate in the process.[6] *American Surety Co. v. Baldwin*, 287 U.S. 156, 163-164 (1932).

III.

THIS COURT HAS NO JURISDICTION UNDER 28 U.S.C. § 1257 BECAUSE THE ORDERS BELOW ARE NOT "FINAL JUDGMENTS OR DECREES."

The cases in which this Court has measured state judicial qualifications against the requirements of constitutional due process did not reach this Court until a final judgment had been rendered by the state's highest court. *See, e.g., Aetna Life Ins. Co. v. Lavoie, supra.* Petitioners seek review of an order granting a new trial. Orders granting new trials (including those based on the weight of the evidence) are not final judgments or decrees within the meaning of 28 U.S.C. § 1257.

West Virginia's policy of permitting interlocutory appeals from orders granting new trials does not make them "final." "[I]t

---

6. Petitioners argue that the lower court in this case formulated a new standard for granting new trials justifying their waiting until rehearing to raise their current due process claim; but their argument attributes to a *per curiam* decision authority that is not recognized in West Virginia (*see* App. A, 11a, n. 3). It is clear from the lower court's decision that it did not perceive itself as applying a new rule of state law.

frequently has been said that for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court . . . directed.' (citation omitted) Thus, where the effect of the state court's direction is to grant a new trial, the judgment will not be final." *Gospel Army v. City of Los Angeles,* 331 U.S. 543, 546 (1946).

Nor is the acting Chief Justice's subsequent denial of W.R. Grace's motion to disqualify a "final judgment or decree." Under West Virginia's diaqualification rule, orders regarding disqualification are interlocutory in nature and not subject to direct or immediate appeal except by extraordinary writ, a remedy Petitioners have not yet invoked. Rule XVII(f), *Trial Court Rules for Trial Courts of Record.* (Resp. App. B, 3a)." Such orders can, however, be effectively appealed after final judgment is entered.[7]

Petitioners' reliance on *Cox Broadcasting Corp. v. Cohen,* 420 U.S. 469 (1975) is misplaced. In *Cox Broadcasting,* the Georgia Supreme Court upheld the constitutionality of a Georgia statute prohibiting the broadcasting of names of rape victims, but remanded the case for further proceedings regarding plaintiff's

7. Likewise, a federal judge's refusal to disqualify his/herself upon the filing of an affidavit of bias or prejudice pursuant to 28 U.S.C. § 144 is not a "final decision" within the meaning of 28 U.S.C. § 1291. *In re City of Detroit,* 828 F.2d 1160, 1165-67 (6th Cir. 1987); *In re Corrugated Container Antitrust Litigation,* 614 F.2d 958, 960-961 (5th Cir.), *cert. denied,* 449 U.S. 888 (1980); *United States v. Washington,* 573 F.2d 1121, 1122 (9th Cir. 1978); *Vuono v. United States,* 441 F.2d 271, 272 (4th Cir. 1971); *Robinson v. Largent,* 419 F.2d 1327 (3d Cir. 1970). And since the denial of recusal can be effectively appealed after final judgment, it is not a "collateral order" under the doctrine of *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). *See, e.g., In Re Corrugated Container Antitrust Litigation, supra.*

civil damages claim for invasion of privacy. Left unreviewed, the decision upholding the Georgia statute threatened to broadly restrict the exercise of important First Amendment rights. *Id.* at 485-486. An unreviewed state court decision regarding a trial judge's qualifications to hear a specific case poses no comparable threat. Only the parties to the litigation will be affected and their concerns may be mooted by the outcome of the new trial. No broad federal policy will be served by departing from the finality requirement of 28 U.S.C. § 1257 in order to police state court judicial qualifications prior to final disposition by the state courts themselves.

Immediate review by this Court would obviate the necessity of a new trial should petitioners prevail on the purported federal issue. However, this perceived utility is fully offset by the corresponding waste of this Court's efforts should the federal issue be mooted by Petitioners' success in the state court proceedings to follow. In either event, time and resources will be expended to resolve issues that might have been mooted had the other course been chosen.

CONCLUSION

The Respondents pray that this Court deny the Petition for Writ of Certiorari because this case presents no issue appropriate for the Court's review.

Respectfully submitted,

THOMAS R. SHERAN
Counsel of Record
MOSS & BARNETT
4800 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 347-0300

Attorneys for Respondents
State of West Virginia,
City of Spencer, West Virginia and
the Monroe County Commission,
Monroe County, West Virginia

DARRELL V. McGRAW, JR.
Attorney General
SILAS B. TAYLOR
Managing Deputy Attorney General
State of West Virginia
State Capitol, Room 26-E
Charleston, West Virginia 25305
(304) 558-2021

Attorneys for Respondent
State of West Virginia

APPENDIX A — WEST VIRGINIA CODE 1966 CHAPTER 50, APPEAL AND ERROR, ARTICLE 5, APPELLATE RELIEF IN SUPREME COURT OF APPEALS

WEST VIRGINIA CODE 1966 CHAPTER 50, APPEAL AND ERROR, ARTICLE 5, APPELLATE RELIEF IN SUPREME COURT OF APPEALS

§ 58-5-1 When appeal or writ of error lies.

A party to a controversy in any circuit court may obtain from the Supreme Court of Appeals, or a judge thereof in vacation, an appeal from, or a writ of error or supersedeas to, a judgment, decree or order of such circuit court in the following cases:

(a) In civil cases where the matter in controversy, exclusive of costs, is of greater value or amount than one hundred dollars, wherein there is a final judgment, decree or order;

* * *

(i) In any civil case where there is an order granting a new trial or rehearing, and in such cases an appeal may be taken from the order without waiting for the new trial or rehearing to be had;

Appendix A

* * *

Appeals shall not lie under subdivisions (g), (h) and (i) where pecuniary interests only are involved, unless the amount in controversy, exclusive of costs, exceeds one hundred dollars.

APPENDIX B — WEST VIRGINIA TRIAL COURT RULES FOR TRIAL COURTS OF RECORD

WEST VIRGINIA TRIAL COURT RULES FOR TRIAL COURTS OF RECORD

Rule XVII. Disqualification and Temporary Assignment of Judges.

(a) *Disqualification.* In any proceeding, except an injunction or a summary contempt proceeding, any party may file a written motion for disqualification of a judge. The motion shall be verified, shall state the facts and reasons for disqualification, and shall be accompanied by a certificate of counsel of record or unrepresented party stating it is made in good faith and has evidence sufficient to support disqualification. The motion shall be filed with the circuit clerk at least 21 days in advance of any trial date set in the case or at least 7 days in advance of any date set for a non-trial proceeding in the case. At the time of filing, the moving counsel or unrepresented party shall submit directly to the judge a written notice of the motion.

(1) Upon the filing of such motion, a judge who finds good cause and agrees to recuse himself or herself shall ascertain whether concurrence can be reached between parties as to the designation of a different judge, either from within or without the circuit, to hear the proceeding.

Appendix B

* * *

(3) If concurrence cannot be reached, if the original judge does not agree to recuse himself or herself, or if the designated judge does not consent, then the judge shall:

(A) Proceed no further in the matter; and

(B) Transmit forthwith to the Chief Justice a copy of the motion and certificate, a letter stating his or her response to the motion and reasons therefor, and a completed assigned judge request form provided by the Administrative Office, asking that the Chief Justice rule on the motion or, if the information is insufficient, direct that a hearing be held on the matters relating to the disqualification motion. The letter shall include such matters or considerations as the judge may deem relevant.

(i) If the Chief Justice determines that the evidence set out in support of the disqualification motion is insufficient, the Chief Justice shall, within 7 days of receiving the motion, by order either deny the motion and direct the judge

to proceed with the case or direct the judge to hold a hearing to allow the moving party to make a full record, for the purpose of review if the case is appealed upon final judgment, and then to proceed with the case.

(ii) If the Chief Justice determines that the evidence set out in support of the disqualification motion is sufficient, the Chief Justice shall within 7 days of receiving the motion direct the judge in writing not to proceed with the case and, within 14 days thereof, shall by order assign a different judge to hear the case.

(iii) If the Chief Justice determines that the matters relating to the disqualification motion raise issues sufficient to warrant a hearing before a different judge, the Chief Justice shall, within 14 days of receiving the motion, by order assign a judge from without the circuit to hear the disqualification matters as provided by subdivisions (c)(2) and (3) below.

(4) In the event a disqualification motion is filed with the circuit clerk and written notice thereof is submitted to the judge less than 21 days in advance of the date set for trial or less than 7 days in advance of the date set for a non-trial proceeding, or in the

event the matter is an injunction proceeding or a proceeding for summary contempt, the involved judge shall within 7 days hold a hearing on the motion for disqualification, shall allow the moving party to make a full record, and shall then rule forthwith on the motion for disqualification.

> (A) If the judge denies the motion for disqualification, he or she shall proceed with the case.
>
> (B) If the judge grants the motion, he or she shall proceed no further in the matter and shall:
>
> > (i) Forthwith transmit the motion and reason for the ruling to the Chief Justice, who shall, within 7 days of receipt, by order assign a different judge; or
> >
> > (ii) Proceed pursuant to Subdivisions (1) and (2) or (3) above.

* * *

(f) *Challenge to disqualification rulings.* All rulings and order relating to the recusal or disqualification of a judge shall be considered interlocutory in nature and not subject to direct or immediate appeal. This rule shall not, however, prohibit any party from seeking or using redress available by writ of prohibition or any other appropriate extraordinary writ.

* * *